IN THE CHANCERY COURT FOR SHELBY COUNTY, TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE, *ex rel.*	)	
ROBERT E. COOPER, JR., ATTORNEY	)	
GENERAL and REPORTER,	)	
	)	**No. CH-08-1979-1**
Plaintiff,	)	
v.	)	**JURY DEMAND**
	)	
	)	
BLUEHIPPO FUNDING, LLC, et al.	)	
	)	
Defendants.	)	

STATE'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION AND ASSET FREEZE

The State respectfully replies to the Defendants' Response in Opposition to Plaintiff's Motion for Temporary Injunction and Asset Freeze.

The Defendants argue that the State is not entitled to a temporary injunction because (1) the State cannot show an irreparable harm; (2) the State cannot show a strong likelihood of success on the merits; (3) the Defendants will be harmed by the temporary injunction; and (4) the impact of the temporary injunction on the public interest is 'questionable.'

The Defendants further assert that an asset freeze should not be issued because (1) of a lack of statutory authority, (2) insufficient evidence to prove that BlueHippo consumers in Tennessee suffered an "ascertainable loss" and (3) the lack of a lien or interest in any of the Defendants' assets.

All of the Defendants' arguments are without merit, as discussed below.

I. The standard for a statutory temporary injunction is showing a substantial likelihood of success on the merits of its action, which is in the public interest.

The Defendants dispute the applicable legal standard for a statutory temporary injunction and assert that the traditional Rule 65 factors should be applied to this civil law enforcement proceeding. Defs. Resp. Br., at 14.

The wealth of case law states that when a governmental entity seeks a temporary injunction, the central inquiries are whether there is a substantial likelihood of success on the merits and whether the injunction is in the public interest. The Defendants attempt to distinguish one case, *SEC v. Youmans*, 729 F.2d 413 (6th Cir. 1984), cited in the State's Memorandum in Support of its Temporary Injunction Motion, but do not even attempt to distinguish the plethora of other cases, including FTC cases applying the "substantial likelihood of success on the merits" standard.[1]Many other Tennessee trial-level courts have routinely applied this standard to statutory temporary injunction motions.[2]

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1 See also, *FTC v. Nat'l Testing Servs., LLC*, 2005 WL 2000634, at *3 (internal citations omitted); *FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2008 WL 4908769, at *1(M.D. Tenn. Nov. 12, 2008) ("The statute places a lighter burden on the FTC than that imposed on private litigants by the traditional equity standard because the FTC need not prove irreparable harm to obtain a preliminary injunction.); *Microsoft Corp.*, 136 F.Supp.2d 738-39 ("Because an injunction against infringing activity is authorized by statute, however, the Court need not consider these equitable factors [including irreparable harm]. Simply fulfilling the requirements of the statute or, in other words, fulfilling the first factor for an injunction to issue-showing a strong likelihood of success on the merits-is all that is needed for the Court to issue an injunction."); *SKS Merch., LLC v. Barry*, 233 F.Supp.2d 841, 845 (E.D. Ky. 2002); *FTC v. Int'l Computer Concepts, Inc.*, No. 594CV1678, 1994 WL 730144 at *12 (N.D. Ohio Oct. 24, 1994); See also, *United States v. City of Painsville*, 644 F.2d 1186, 1194 (6th Cir. 1981) (upholding issuance of permanent injunction for violation of Clean Air Act without evidentiary hearing assessing irreparable harm and inadequate remedy at law).

2 *State v. Froehlig*, No. 33293, 2, Ch. Ct. of Tenn., 21st Jud. Dist., Williamson County (March 2007) ("A showing of immediate and irreparable harm is assumed with a violation of the statute. Proof of immediate and irreparable harm or the inadequacy of other remedies is not required for a statutory temporary injunction."); *State v. Olomoshua*, No. 06C2912, 2, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Part III (Nov. 1, 2006) ("[T]he movant's burden for a statutory temporary injunction is met upon a demonstration of a likelihood of success of demonstrating at trial that the non-movants are violating the statute. A showing of immediate and irreparable harm is assumed with the violation of a statute."); *Tennessee Real Estate Comm. v. Hamilton*, No. 96-3330-III, 12-13, Ch. Ct. of Tenn., 20th Jud. Dist., Davidson County, Part III (Dec. 1996), *aff'd* , No. 01A01-9707-CH-00320, 1998 WL 272788, at *4-6 (Tenn. Ct. App. May 22, 1998); *State v. Continental Distributing Co., Inc.*, No. 74892, 1-3, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County, Part I (Oct. 1994).

Moreover, the standard parallels the State's temporary injunction authority. The TCPA authorizes the Attorney General to seek temporary injunctions "whenever the [State] has reason to believe that any person *has engaged in, is engaging in* . . . any act or practice declared unlawful by this part and that proceedings would be in the public interest . . . ." Tenn. Code Ann. § 47-18-108(a)(1) (emphasis added).

Considerations about timing and irreparable harm are not part of the legal standard for a statutory temporary injunction. Nevertheless, the Defendants have made much of the fact that the State's lawsuit was filed fourteen (14) months after the original Request for Consumer Protection Information was served. However, the delay was due to Defendants withholding information, not the lack of irreparable harm to consumers.[3] In an attempt to obtain information from the Defendants to investigate its business practices, the State continually extended production deadlines in good faith. However, as information came trickling in, it became clear to the State that Tennessee consumers were being harmed by the Defendants' actions. Although the State originally hoped it could work with the Defendants to resolve its concerns, the Defendants' repeated delay convinced the State that litigation was in the consumers' best interest. Therefore, despite the Defendants' requests, the State was forced to sue and move for a temporary injunction and asset freeze to prevent continuous harm to Tennessee consumers.

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3 The State sent a pre-filing subpoena to BlueHippo requesting documents and information, including all current and historical advertisements, on August 20, 2007. After BlueHippo missed numerous production deadlines, the State filed a Petition for an Order to Compel Compliance with the State's Request for Consumer Protection Information. In lieu of the hearing, the State and the Defendants agreed to a series of production schedules ultimately resulting in three separate Agreed Orders. To date, BlueHippo has not produced all of the information requested in the Third Agreed Order. On March 5, 2008, Tennessee and twenty-two (22) other states sent a letter to Clay Friedman, BlueHippo's counsel, informing him that a multistate group had formed to investigate the business practices of BlueHippo. From March until July, the BlueHippo Multistate Executive Committee and Mr. Friedman heavily negotiated all terms of the Multistate Request for Consumer Protection Information. On July 3, the State served the agreed upon Multistate Request on BlueHippo with the most extensive documents becoming due on July 28, 2008. In order to get a portion of the documents, the Executive Committee had to negotiate an extension letter and two Agreed Orders. Between the First and Second Agreed Orders, the State sent BlueHippo a notice of its intent to sue, as required by Tenn. Code Ann. § 47-18-108(a)(2).

As established below, the State has shown, by the Defendants' advertisements, sales scripts, recorded sales calls, contracts, other correspondence with consumers, and consumer affidavits, that it has a strong likelihood of succeeding on both its Prizes Offered as Inducements claim and general TCPA claim. An injunction is in the public interest because in these cases harm to the public interest is presumed and private interests are given little weight. In any event, the Defendants' deprivation of .875%[4] of its total sales nationwide cannot plausibly be considered to hinder the Defendants' business.

II. The State has shown a likelihood of success on the merits of its Prizes Offered as Inducements and general TCPA claims

The State has supported its substantial likelihood of success on the merits of both its Prizes Offered as Inducements and its general TCPA claim in great detail in Attachment A to its Memorandum in Support, which annotates the factual allegations contained in the Complaint with specific citations to the record. For the sake of brevity, the State does not repeat those lengthy supported allegations here, but incorporates Attachment A to its Memorandum in Support by reference.

The Defendants assert that the State has failed to provide evidence in support of its temporary injunction motion. Defs.' Resp. Br., at 27. The Defendants assert that only the affidavits from consumers in the Current Business Model can be used in support of its Temporary Injunction Motion and state, ***without any legal authority***, that "It is inappropriate to issue an injunction based on historical business practices." Defs. Resp. Br., at 27. The Defendants' arguments are without merit.

4 Ex. 39 to Temp. Inj. Mot., Ltr. from Clay Friedman.

First, the temporary injunction authority under the TCPA explicitly authorizes the State to seek injunctions for historical conduct. The statute states, "Whenever the division has reason to believe that any person ***has engaged in*** . . . any act or practice declared unlawful by this part and that the proceedings would be in the public interest." Tenn. Code Ann. § 47-18-108(a)(1) (emphasis added). Similarly, under federal case law, the FTC is authorized to seek temporary or permanent injunctive relief for past or threatened unlawful practices.[5]

Second, aside from the consumer affidavits, which show, among other things, ascertainable losses as a result of the Defendants' acts or practices, the State has submitted the Defendants' advertisements, sales scripts, select recorded sales calls, consumer contracts, other correspondence with consumers in support of its Temporary Injunction Motion. These materials, and the consumer affidavits, both show violations of the Prizes Offered as Inducements statute and the TCPA and ascertainable loss as a result of the Defendants' unlawful acts or practices.

A. The Prizes Offered As Inducements Statute applies to the Defendants' conduct including advertisements and the State has shown a substantial likelihood of success on its claim that the statute was violated.

The Defendants argue that the statute does not apply to "free" items and contend that the definition of prize focuses primarily on "games of chance," that the enumerated deceptive acts and practices relating to prizes focuses on consumers "winning" or "being selected" for something, that the definition of "initial offers" applies only to those offers which can be accepted, and that the legislative history for the statute shows that the statute only applies to games of chance. The Defendants' arguments are inconsistent with the plain language of the statute, but even if one applies basic canons of statutory construction, the Defendants' argument fail.

5 *Willis v. Lipton*, 947 F.2d 998, 1002 (1st Cir. 1991).

As way of background, the Prizes Offered as Inducements statute has seven subdivisions. Subdivision (a) defines key terms in the statute. Subdivision (b) sets forth the scope of the statute. Subdivision (c) enumerates specific unfair or deceptive acts. Specifically, (c)(1) enumerates unfair or deceptive acts in an initial offer. (c)(2) enumerates unfair and deceptive acts "either in an initial offer or, at a minimum before an offer can be accepted." (c)(3) and (4) enumerate other unfair or deceptive acts. Subdivision (d)(2) makes all contracts "non-binding" on the consumer unless all of the disclosures in (c) have been made. Subdivisions (e) and (f) provide exemptions to the statute. Subdivision (g) provides the State's civil penalty authority.

1. Tennessee's Prizes Offered As Inducements Statute covers any prize offered as an inducement and is not limited to games of chance.

The Defendants assert that the Defendants' free offers (televisions, cameras, printers, etc.) do not constitute prizes under the statute based, in part, on the purported legislative history of the statute. The plain language of the Prizes Offered as Inducement statute and even well-established rules of statutory construction make clear that the Defendants' "free items" constitute "prizes" under the statute.

The Defendants selectively highlight portions of the definition of "prize" and ignore the portions of the statute that are unfavorable to their argument. The Defendants state: "First, free items do not fall under the statutory definition of "prizes" because the definition focuses primarily on sweepstakes, contests, or drawings, all of which involve an element or game of chance." A full reading of the definition of prize shows that prizes certainly include "games of chance, " but is not limited to that subset and is instead focused more broadly on "any thing of value." Tenn. Code Ann. § 47-18-120(a)(3) states the following:

> "Prize" means prize, ***gift***, award, ***incentive promotion or any thing of value***. "Prize" includes, ***but is not limited to***, any thing of value offered in a sweepstakes, contest, drawing, ***incentive offer***, premium promotion or similar promotional offer by whatever name the company uses." (emphasis added).

The Defendants again selectively cite provisions of the statute, namely Tennessee Code Annotated § 47-18-120(c)(1)(B),(C),(F), and (G) for the proposition that "[t]he enumerated deceptive acts and practices relating to prizes generally pertain to consumers "winning" something, or being "selected" for something, none of which apply to BlueHippo." Defs. Response Br. at 23. The Defendants neglect to state that each enumerated deceptive act in (c)(1) is actionable because of the word "**or**" in Tennessee Code Annotated § 47-18-120(c)(1)(I). In other words, the enumerated deceptive acts in (c)(1) that do not contain references to games of chance, namely Tennessee Code Annotated § 47-18-120(c)(1)(A), (D), (E), (H), and (I) are actionable in themselves.

Elsewhere, the Defendants argue that the legislative history to the statute supports their contention that the Prizes Offered as Inducements statute only applies to offers of games of chance or other schemes where consumers are led to believe that they may win a prize or receive a gift if they do something. Defs.' Resp. Br., at 25. Regardless of what the legislative history of the statute says, it cannot override the statutory text. As the Tennessee Court of Appeals has noted:

> Relying on legislative history is a step to be taken cautiously. Legislative records are not always distinguished for their candor and accuracy and the more that courts have come to rely on legislative history, the less reliable it has become. Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts' interpretation of the statute. Even the statements of sponsors during legislative debate should

> be evaluated cautiously. These comments cannot alter the plain meaning of a statute because to do so would be to open the door to the inadvertent, or perhaps planned, undermining of statutory language. Courts have no authority to adopt interpretations of statutes gleaned solely from legislative history that have no statutory reference points. Accordingly, when a statute's text and legislative history disagree, the text controls. *Bellsouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 674 (Tenn. Ct. App. 1997) (internal citations and quotations deleted).

However, "[i]f the statute is unambiguous, [courts] must follow the plain and ordinary meaning without applying other statutory rules of construction. [Courts] are not at liberty to depart from the words of [a] statute. Rather, [courts] must presume that the legislature says in a statute what it means and means in a statute what is says there." *Robinson v. Fulliton*, 140 S.W.3d 312, 317-318 (Tenn. Ct. App. 2003) (internal citations and quotations omitted).

Here the scope of the statute, the definition of "prize," the definition of "initial offer," the exceptions, and the statute's use of the term "or" to make each enumerated deceptive act actionable all point to a rejection of the Defendants' argument.

The Defendants also assert that if "free" items constitute prizes under the statute, the State will have to commence enforcement proceedings against other retailers who make similar offers. This is not a valid defense. Even if deceptive conduct has become a common, recognized part of a particular industry, such fact will not operate as a defense. See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493-494 (1922).

2. Advertisements are covered under the Prizes Offered as Inducements Statute.

In essence, the Defendants argue that the term "initial offer" only applies to offers that can be accepted and contend that advertisements are merely invitations to negotiate. Defs. Resp.

Br., at 24. The Defendants base this reading in large part on the mere presence of the defined term "acceptance" in the statute. *Id.*

From a reading of the plain language of the statute, it is clear that advertisements are included within the defined term "initial offer" and that the Legislature did not intend this restrictive conception. The definition of "initial offer" is unambiguous, but broad, and means "the first contact with a consumer or person, whether verbally or in writing." Tenn. Code Ann. § 47-18-120(a)(2). "In seeking to ascertain legislative intent, [courts] must look to the entire statute to avoid any forced or subtle construction of the pertinent language." *Lyons v.* Rasar, 872 S.W.2d 895, 897 (Tenn. 1994).

The interplay between the terms "initial offer" and "acceptance" and the presence of the term advertisements throughout the statute deflate the Defendants' argument. For example, Tennessee Code Annotated § 47-18-120(c)(2) enumerates deceptive acts or practices based "either in an initial offer ***or, at a minimum, before an offer can be accepted*** . . ." (emphasis added). This leads to an unanswerable epistemological question: If initial offer means "an offer that can be accepted," as the Defendants suggest, why would the Legislature state this twice in Tenn. Code Ann. § 47-18-120(c)(2) and use the term "at a minimum?" Under long-established rules of statutory construction, "[t]he Court should assume that the Legislature used each word in the statute purposely and that the use of the words conveyed some intent and had a meaning and purpose." *Chadwell v. Knox County*, 980 S.W.2d 378, 382 (Tenn. Ct. App. 1998).

Upon a full reading of the statute, the Defendants' position becomes even more dubious. The legislature explicitly mentioned advertisements ***in the scope*** of the "Prizes Offered As

Inducements" statute.[6] Other examples abound that show that advertisements are contemplated by the reach of the statute. In the chief exemption provision for the Prizes Offered As Inducements Statute, the Legislature specifically exempts "***Advertising and promotional plans*** of persons covered by the provisions of the Tennessee Time Share Act of 1981 . . . and the Membership Camping Act . . . ." Tenn. Code Ann. § 47-18-120(f)(1) (emphasis added). Under the Defendants tortured reading of the statute, the exemption paragraph makes no sense. If advertisements are not covered by the statute in the first instance, why are certain advertisements exempted from the statute's reach?

Again, under long-established rules of statutory construction, "[t]he Court should assume that the Legislature used each word in the statute purposely and that the use of the words conveyed some intent and had a meaning and purpose." *Chadwell v. Knox County*, 980 S.W.2d 378, 382 (Tenn. Ct. App. 1998).

Other parts of the statute support the State's reading of the statute. For example, Tennessee Code Annotated § 47-18-120(4)(A) states the following:

> ***Either in an initial offer for a prize*** . . . or at a minimum before an offer ***can be*** accepted, the offeror is in violation of this part if the offeror fails to clearly and conspicuously state verbally, or in writing, and upon request in writing, uses or makes a statement or representation in the main, primarily or emphasized portion of the text of the solicitation, promotion, ***advertisement or other offering***[7] that is contradicted in a disclosure that is not easily read,

6 "This section applies to [a]ny person engaged in trade or commerce, directly or indirectly, by any means, including, but not limited to, by mail, by telephone, ***by advertisement***, or in person, who offers to a consumer or other person, or represents or leads a consumer or person to believe, that the consumer or person will or may receive any prize as an inducement to purchase a good, service or other product or otherwise incur a monetary obligation, visit a business, attend or listen to a sales presentation or otherwise contact a salesperson . . ." Tenn. Code Ann. § 47-18-120(b)(1) (Emphasis added).

7 "[W]here general words follow special words which limit the scope of the statute, general words will be construed as applying to things of the same kind or class as those indicated by the preceding special words." *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994).

> readily noticeable or presented in small or fine print. (emphasis added).

This provision has an exception, which also shows that advertisements are contemplated by the statute and constitute "initial offers." Tennessee Code Annotated § 47-18-120(4)(B) states the following:

> If a motor vehicle dealer is in compliance with the ***advertising regulations*** of the Tennessee motor vehicle commission, as such regulations exist on July 1, 2003, and as amended from time to time thereafter, the provisions of subdivision (c)(4)(A) shall not apply to such dealer. (emphasis added).

These two examples show fatal flaws in the Defendants' argument. If advertisements are not "initial offers," why are they referred to in conjunction with "other offerings" in Tenn. Code Ann. § 47-18-120(4)(A)? If advertisements are not "initial offers," why would the Legislature exempt these advertising regulations from the reach of the statute in Tennessee Code Annotated § 47-18-120(4)(B)? "The Court should assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose." *Chadwell v. Knox County*, 980 S.W.2d 378, 382 (Tenn. Ct. App. 1998) (citing *Anderson Fish & Oyster Co. v. Olds*, 277 S.W.2d 344, 346 (Tenn. 1955)).

3. Under the Prizes Offered as Inducements Statute the State can obtain rescission of all contracts if covered disclosures are not made

The Defendants assert that "even if the prize statute is found to apply to BlueHippo's free items, Plaintiff's remedy for any technical violations is limited to civil penalties. An award of restitution or the issuance of an injunction is unavailable because there is no ascertainable loss to consumers." Defs.' Resp. Br., at 27. This is erroneous on two fronts. First, the argument ignores the plain text of Tennessee Code Annotated § 47-18-120(d)(2), which allows for rescission of contracts when any covered disclosure in subdivision (c) has not been made. Second, the

Defendants' conclude that all of the disclosures covered by the statute have not resulted in ascertainable losses for consumers, when this is not the case as evidenced by the consumer affidavits and other materials found in the record.

B. The State has shown a likelihood of success on the merits of its general TCPA claim.

The State has shown a substantial likelihood of success on the merits of its general TCPA through its Attachment A to the Memorandum in Support and the Memorandum in Support. Rather than revisit those arguments, the State addresses the Defendants' contention that "a plaintiff must show that the alleged wrongful conduct under the Act ***proximately caused the injury alleged.***" Defs. First Resp. Br., at 17 (citing *Fleming v. Murphy*, No. W2006-00701-COA-R3-CV, 2007 WL 2050930 (Tenn. Ct. App. July 19, 2007) (emphasis added). This is incorrect as a matter of law. *Fleming* involved the private right of action for the TCPA, which requires "an ascertainable loss of money or property . . . as a result of an unfair or deceptive act or practice declared unlawful by this part." Tenn. Code Ann. § 47-18-109(a)(1). While the State can seek restitution as part of its remedy, the State has the ability to obtain relief, including civil penalties, based on mere violations of the Act, ***regardless of ascertainable loss***. Tenn. Code Ann. § 47-18-108(b)(3) (triggered by violations).

Additionally, the Defendants choose to attack only the catch-all provision of the State's general TCPA claim and state that "[t]he catch-all provision of the TPCA is too vague and nonspecific to deem it likely, this early in the lawsuit, that Plaintiff will prevail. The trier of fact will have to determine whether BlueHippo's Current Business Model is deceptive." Defs.' Resp. Br., at 22. The State does not need to show that the Defendants' Current Business Model is deceptive to succeed on its general TCPA claims, rather the State has to show that individual acts

or practices are deceptive. As the Defendants' concede, all the State has to prove is that the deceptive act or practice is "one that causes ***or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact.***" Defs.' Resp. Br., at 21 (citing *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005) (emphasis added). This is not a high standard. As one example, the State merely has to show that the Defendants' representations about shipping dates have misled consumers as to a matter of fact. There is ample evidence that this occurred.[8]

8 Ex. 11, Aff. of Kathy Collins, at para. 12 (consumer understood she would receive computer after third payment); Ex. 21, Aff. of Cari Wilson, at para. 5 (thought she would receive computer in four weeks); Ex. 26, Aff. of Idell Robertson, at para. 13 (30 days); Ex. 28, Aff. of Jo Ann Qualls, at para. 8; Ex. 31, Aff. of Thelma Harrison, at para. 5 (4-6 weeks); Ex. 4, Aff. of Connie Roberts, at para. 9, 14 (5 payments); Ex. 30, Aff. of Rosie Cannon, at para. 8 (4-5 payments); Ex. 29, Aff. of Robert Hughes, at para. 5 (6 weekly payments); Ex. 25, Aff. of Barbara Smith, at para. 5 (6-9 weeks); Ex. 27, Aff. of Allen Hubbard, at para. 14 (9 payments); Ex. 5, Aff. of Patty Serda, at paras. 12-13 ("It was my understanding that I would receive the computer after three months of payments . . . I have called BlueHippo to check on the status of my order. They told me my computer would arrive in three months from my order date. After I called after three months, they told me that it would be shipped after 6 months. As of this date [May 8, 2008] I have not received a computer or any free merchandise from BlueHippo."); Ex. 18, Aff. of Christine Pruitt, at para. 14; See also, Ex. 5, Aff. of Danika Blunt, at para. 8, 13 ("I have called Blue Hippo to ask about the delivery of my computer and every person that I talked to always told me, 'the tracking number is on its way.' As of this date [May 15, 2008], I have not received a computer or any free merchandise from BlueHippo."); Ex. 7, Aff. of Billy Bowling, at para. 11 (told 3 months); Ex. 8, Aff. of Jessica King, Attach. B ("Based on your payment history so far, provided you continue making your payments as agreed, your computer should be ready to order, build, finance and ship shortly."); Ex. 9, Aff. of Angela Atkins, at para. 14, 13 (3 months) ("I have called BlueHippo to check on the status of my order. The first time I called in August they said it was in the mail. Two weeks later, they told me it was in the warehouse waiting to be shipped. As of this date [May 21, 2008] I have not received a computer or any free merchandise from BlueHippo."); Ex. 12, Aff. of Cynthia Brunat, at paras, 5, 10 (2 months worth of payments) ("After I did not receive the computer, I called BlueHippo numerous times to find out when I would receive my computer. They always told me that my computer would be shipped in five to ten (5 to 10) business days."); Ex. 14, Aff. of Nora Shrewsbury, at paras. 13, 15 ("I called BlueHippo around February 6, 2008 to check on the status of my order. They told me my computer would arrive in approximately two (2) more weeks. As of this date [February 29, 2008] I have not received a computer or any free merchandise from BlueHippo.")("It was my understanding that I would receive the computer after the ten (10) payments."); Ex. 14, Aff. of Shinetta Berry, at para. 11 ("I did not receive the computer in time to give to my son as a graduation present."); Ex. 16, Aff. of Rebecca Good, at para. 14 ("I called BlueHippo and told the representative I no longer wished to make payments to the company. The representative would tell me I just needed to make two more payments. After I made the two additional payments, I still did not receive my computer. I called again and the representative told me I needed to make more payments and the computer would ship. I continued to make payments and never received my computer. Finally, I called and cancelled my account."); Ex. 16, Aff. of Rebecca Good, at para. 156 (9 payments); Ex. 19, Aff. of Linda Taylor, at para. 10 ("I thought that I would be receiving my computer and free merchandise right away."); Ex. 20, Aff. of Brenda Lowrance, at para. 12 (after half the payments); Ex. 24, Aff. of Karen Williams, at para. 10 (after half the payments).

C. An Injunction is in public interest

Generally speaking, the Defendants make two principal arguments why the State's injunction would not be in the public interest, namely, the "crippling" loss of capital and expense of complying with the injunction and the presence of the FTC's Consent Decree to which the Defendants submitted.

1. Private interests are given little weight. Public harm is presumed.

At the outset, when the Court balances the hardships of public interest against a private interest under a statutory injunction, the public interest receives the greater weight.[9] In such cases involving violation of law, harm to the public interest is presumed.[10] In another case involving the FTC in the Middle District of Tennessee, stated:

> Under the more lenient standard, the Court must determine the likelihood the FTC will ultimately succeed on the merits and balance the equities. While it is proper for the Court to consider private hardship in deciding to grant an injunction, ***the Court must afford such concerns little weight,*** lest the Court undermine the purpose of [the FTC's authority] which is to protect the public at large, rather than individual private competitors." *FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2008 WL 4908769, at *1 (M.D. Tenn. Nov. 12, 2008) (emphasis added).

The Defendants' claim that a $2.5 M asset freeze would deprive it of much needed capital and force it to incur substantial costs for compliance. Here, even if these considerations are given more than a "little weight," they are dubious propositions. The Defendants have already admitted that sales in Tennessee only comprise ***.875% of the Defendants' total sales nationwide.***[11] It is hard to see how .875% of the Defendants' total sales could constitute a significant deprivation of capital. Moreover, upon a substantial showing of a likelihood of

9 *FTC v. Nat'l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634, at *3 (M.D. Tenn. Aug. 18, 2005).
10 *Nat'l Testing Servs., LLC*, 2005 WL 2000634, at *3.
11 Ex. 39 to Temp. Inj. Mot., Ltr. from Clayton Friedman.

success on the merits by the State, the Defendants costs of compliance concerns amounts to an argument that they are allowed to continue to commit unlawful acts if the not doing so would cost them money.

2. FTC's Consent Decree does not prevent issuance of the injunction the State seeks.

The Court should not rely on the FTC Consent Order between BlueHippo Funding, LLC, BlueHippo Capital, LLC and the Federal Trade Commission to deny the State's Motion. The Defendants contend that such reliance is appropriate because (1) due to the existence of the FTC Consent Order, the State is not likely to succeed on the merits and irreparable harm does not exist, and (2) since some Tennessee consumers are eligible for restitution under the FTC Consent Order, the State is not seeking the asset freeze in good faith.

The Defendants argue that the Court should conclude the State is not likely to succeed on the merits since the FTC Consent Order imposes injunctive-relief requirements onto BlueHippo. The Defendants cite *California v. American Stores Co.*, 872 F.2d 837, 843-844 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990), to support the contention that courts look to FTC consent decrees for guidance. See Defs.' Resp. Br. at 16. However, in *American Stores*, the court held that the district court did not abuse its discretion in finding California was likely to succeed on the merits even when the defendants had a pre-existing FTC consent order resolving antitrust violations since California may have had different interests than the FTC in protecting its citizens from antitrust violations.[12] Therefore, an existing consent decree between the Defendants and the FTC does not preclude the State from succeeding on the merits in its action.

Further, the consent decree does not show the lack of irreparable harm to Tennessee consumers. The FTC Complaint does not contain most of the allegations set forth in the State's

12 *Id*. at 844.

Complaint including violations of the "Prizes Offered as Inducements" statute, Tenn. Code Ann. § 47-18-120 *et seq*. *See* Compl. at ¶ 372-89.[13] Courts have held that injunctive relief is appropriate even in cases where the Defendants have entered into a consent decree with another agency regarding similar issues.[14] If the pre-existing consent decree does not address all of the harms the injunctive relief seeks to preclude, it is not redundant to grant such relief.[15] Since the FTC Consent Order only resolves violations alleged in its complaint, it does not adequately protect Tennessee consumers from the harm contemplated by the State in its Complaint and Motion for Temporary Injunction. Therefore, the existence of the FTC Order does not prove the lack of irreparable harm and an injunction is appropriate.

III. This court has the ability to grant an asset freeze.

Consistent with the application of FTC case law, this court's authority to grant temporary injunctions under the TCPA as well as its authority to grant rescission of consumer contracts under Tennessee Code Annotated § 47-18-120(d)(2), consumer restitution under Tennessee Code Annotated § 47-18-108(b)(1), and permanent injunctive relief, authorizes the State to seek and obtain asset freezes. The chief concern in such asset freezes is how an asset freeze will affect ***defrauded consumers***, not the effect on the company.[16]

The Defendants argue that "Tennessee courts follow federal law when interpreting provisions of the TCPA." Defs.' Resp. Br., at 35 (citing Tenn. Code Ann. § 47-18-115). Under FTC case law, the FTC is able to obtain asset freezes without a heightened showing of

13 The FTC Complaint alleges violations of the Federal Trade Commission Act ("FTC Act"), including misrepresentations regarding the timing of shipments to consumers, failure to disclose that payments are non-refundable, violations of Commission's Trade Regulation Rule Concerning the Sale of Mail or Telephone Order Merchandise (the "Mail Order Rule"), and violations of the Electronic Fund Transfer Act ("EFTA").
14 *FTC v. National Urological Group, Inc.*, No. 1:04-CV-3294-CAP, 2008 WL 2414317, at *32 (N.D.Ga June 4, 2008) (holding injunctive relief sought by the FTC was appropriate even though Defendants entered into a consent decree with the FDA involving its advertisements).
15 *See Id.*
16 See, *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

irreparable harm or a showing of disposition of assets. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *Federal Savings and Loan Ins. Corp. v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989).

The Defendants argue that the State does not possess the authority to seek asset freezes. Defs' Resp. Br., at 34-35. However, the wealth of case law treats such asset freezes as a form of preliminary injunction,[17] which the State is authorized to seek under Tennessee Code Annotated § 47-18-108(a)(1). Even if one were to disregard this authority, this court still retains its authority to temporarily freeze assets to provide effect to the final relief of rescission in Tennessee Code Annotated § 47-18-120(d)(2), restitution under Tennessee Code Annotated § 47-18-108(b)(1), and a permanent injunction under Tennessee Code Annotated § 47-18-108(a)(1).

The Defendants' *ultra vires* argument is similar to arguments made challenging the FTC's authority to seek asset freezes. Under the Federal Trade Commission Act, by the express terms of the statute, the FTC is only allowed to seek preliminary relief after they have exhausted their administrative proceedings.[18] In a plethora of cases, federal courts have held that the courts, under the Federal Trade Commission Act, have the power to order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible. See, e.g., *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1434 (11th Cir. 1984); *FTC v. Intn'l Computer Concepts, Inc.*, No. 5:94CV1678, 1994 WL 730144 (N.D. Ohio Oct. 24, 1994); *FTC v. H.N.*

17 See, *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982); See also, *Federal Savings and Loan Ins. Corp. v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989).

18 Section 13(b) of the Federal Trade Commission Act states: "Whenever the Commission has reason to believe that any person . . . is violating, or is about to violate any provision of law enforced by the Federal Trade Commission, and that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public the Commission . . . may bring suit to enjoin any such act or practice . . . Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

Singer, 668 F.2d 1107, 1112 (9th Cir. 1982); FTC *v. World Wide Travel Brokers*, 861 F.2d 1020, 1026 (7th Cir. 1988) (adopting holdings of *Singer* and *U.S. Oil & Gas Corp.*).

In *Singer*, for example, the Ninth Circuit held that the district court possessed the ability to enter an asset freeze to preserve the possibility of rescission as a final remedy for a violation of the Franchise Rule under § 19 of the FTCA. *H.N. Singer, Inc.*, 668 F.2d at 1112. Similarly, this Court has the ability to rescind consumer contracts for violations of the Prizes Offered As Inducements Statute, namely Tennessee Code Annotated § 47-18-120(d)(2), which provides for rescission if any of the disclosures in subdivision (c) of the statute are not met.

The Defendants curiously rely on *FTC v. H.N. Singer, Inc.*, for the proposition that a court should issue "asset freeze" motions "with extreme caution" based on the following factors:

> (1) Whether there is evidence that the defendant is disposing of assets, (2) Whether the defendant is out of business or still operating as a going concern; and (3) Whether the drastic remedy of an asset freeze will cripple or destroy the defendant's business. Defs.' Resp. Br., at 36 (citing *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)).

In doing so, the Defendants represent that the court's findings amount to this three factor test, ***when the court did no such thing***. The Ninth Circuit in *Singer* found that the defendant was likely disposing of assets, but this was not a determinative factor or the test used. *H. N. Singer, Inc.*, 668 F.2d at 1113. Instead, the court's concern was focused on its ability to compensate ***those who have been defrauded***. The court stated:

> We agree with the statement in the opinion of [*SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105-1106 (2nd Cir. 1972)]: that the decision to order a temporary freeze on defendants' assets as ancillary relief in an SEC enforcement action requires particularly careful consideration by the district court. ***One of the chief reasons for requiring the defendants to refund illegally obtained proceeds of a public offering is to compensate***

> ***defrauded investors.*** To effect this purpose there may be circumstances where a district court should temporary freeze defendants' assets to insure that they will be available to compensate public investors. Freezing assets under certain circumstances, however, might thwart the goal of compensating investors if the freeze were to cause such a disruption of defendants' business affairs that they would be financially destroyed. Thus, the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief. Here there is no danger that the freeze will disrupt the defendants' business affairs, ***to the detriment of those whom the defendants have defrauded.*** *Id.*

If this were not evidence enough, the Ninth Circuit reaffirmed that showing disposition of assets is not required for an asset freeze and further stated that a showing of irreparable harm is not required. In *Federal Savings and Loan Ins. Corp v. Sahni*, the Ninth Circuit stated:

> We have previously held, in an analogous situation involving the FTC, ***that an asset freeze may issue without such a heightened showing of likely irreparable harm; indeed when 'the public interest is involved in a proceeding of this nature, [the district court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.*** *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). ***Other courts have consistently concluded that an asset freeze in similar contexts does not require that the court find that dissipation is likely***. *See, e.g. Commodity Futures Trading Comm. v. Muller*, 570 F.2d 1296, 1300-1301 (5th Cir. 1978); *Federal Trade Commission v. Southwest Sunsites, Inc.*, 665 F.2d 711, 716-719 (5th Cir. 1982); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

868 F.2d 1096, 1097 (9th Cir. 1989).

The Defendants assert that Tennessee courts have required a showing that a defendant is fraudulently disposing of assets before issuing such relief and cite *Maury Nat'l Bank v. McAdams* , 106 Tenn. 404, 61 S.W. 774 (1900), *State ex rel. Gibbons v. Smart*, No. W2007-01768-COA-R3-CV, 2008 WL 4491729 (Tenn. Ct. App. Oct. 8, 2008), and *Gibson v. Clements*, No. 03A01-9510-CV-00377, 1996 WL 465528 (Tenn. Ct. App. Aug. 16, 1996). All of these

cases are not controlling. *Maury Nat'l Bank* did not establish a standard for asset freezes, but merely involved a judgment lien creditor who did not allege that the judgment debtor had fraudulently transferred an encumbered asset to a third-party co-defendant with sufficient specificity.[19] In *State ex rel. Gibbons v. Smart*, the State indeed sought an asset freeze based upon alleged self-dealing, misappropriation, and/or diversion of the trusts' assets. The Defendants seem to argue that because the State alleged disposition of assets in another case that it should be foreclosed from asserting a different reason based on a different set of facts and a different statutory scheme. Likewise, *Gibson* dealt with a specific statutory construct which enumerates one of the grounds for a creditor's attachment as absconding or concealing property. *Gibson*, 1996 WL 465528, at *3-4.

Asset freezes are not attachments. "While it is true that the asset freeze has an effect comparable to that of an attachment, it is not an attachment. The fact that the conditions for attachment, normally a remedy in actions at law, might not be met does not imply that another equitable provisional remedy is not available." *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982).

The Defendants claim that despite a showing of ascertainable loss, the Court cannot issue a temporary injunction to prevent a defendant from transferring assets in which the plaintiff has no present lien or interest. The only case Defendants use to support this claim is *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-323 (1999). In *Grupo*, the Supreme Court held that since a court's use of its general equity powers is confined

19 *Maury Nat'l Bank*, 61 S.W. 774, 774 (Tenn. 1900) ("It is conceded by complainant that the general rule is that where one comes into chancery he must make good by evidence the averments of his bill on which he seeks recovery, and that where he calls in question a transaction for fraud he cannot content himself with the suggestion that the defendant has failed to show bona fides, but he is bound to furnish satisfactory evidence of the fraud alleged.").

to within the boundaries of traditional equitable relief, the district court lacked power to issue a temporary injunction preventing operator from transferring assets in which no lien or equitable interest was claimed. However, the Supreme Court distinguished its own holding from a previous ruling in *United States v. First National Bank*, 379 U.S. 378, 380 (1965), which approved an injunction preventing a third-party bank from transferring any of a taxpayer's assets.[20] In *First National*, the district court relied on a statute that gave it the power to grant injunctions "'necessary or appropriate for the enforcement of the internal revenue laws.'"[21] The *Grupo* Court reasoned the *First National* case was distinguishable because "it involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing issuance of tax injunctions."[22]

The Sixth Circuit relied upon this distinction to determine that *Grupo* does not preclude the bankruptcy court from enjoining a non-consenting creditor's claim against a non-debtor to facilitate a Chapter 11 plan of reorganization.[23] In *Dow Corning*, the Court found that due to the bankruptcy court's statutory power to grant injunctions "necessary or appropriate to carry out" the Bankruptcy Code, the bankruptcy court is not confined to traditional equity jurisprudence.[24]

Similar to the statutes involved in *First National* and *Dow Corning*, the TCPA authorizes courts, aside from its temporary injunction authority, to "make such orders or render such judgments as may be necessary" to restore an ascertainable loss.[25] Since the court's ability to freeze assets is a statutory power, the *Grupo* standard does not apply. Therefore, the State does

20 *Id.* at 325.
21 *First National Bank*, 379 U.S. at 380, (quoting former 26 U.S.C. § 7402(a) (1964 ed.)).
22 *Id.* at 326.
23 *In re Dow Corning Corporation*, 280 F.3d 648, 657-8 (6th Cir. 2002).
24 *Id.* at 658, (quoting 11 U.S.C. § 105(a)).
25 Tenn. Code Ann. § 47-18-108(b)(1).

not have to demonstrate it has a present lien or interest in the Defendants' assets to support an asset freeze.

Finally, the State acted in good faith when it asked for an asset freeze in the amount of $2,571,601.80. Although the State was aware of the possibility of restitution for Tennessee consumers through the FTC Consent Order, it never received any indication from the Defendants that Tennessee consumers had been compensated. Moreover, the State relied on updated spreadsheets provided by the Defendants in September 2008 to determine the amount to be held *in custodia legis* by the Clerk and Master. The spreadsheets included the amount Tennessee consumers paid to the Defendants as well as the amount of refunds issued to Tennessee consumers. The State assumed the spreadsheets reflected any consumers who had opted for restitution through the FTC Consent Order. The State is not attempting to obtain double restitution for consumers, but merely attempting to protect assets for consumers who have been allegedly harmed by the Defendants' conduct. If consumers elect to receive restitution through the FTC Consent Order after the asset freeze is put into place, the Defendants can inform the court of this compensation to reduce the amount of money being held.

CONCLUSION

For the reason stated above, the State's Temporary Injunction Motion should be granted.

Respectfully submitted,

BRANT HARRELL, B.P.R. No. 24470
ANNE SIMMONS, B.P.R. No. 26272
Assistant Attorneys General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202-0207
Phone: (615) 741-4657
Facsimile: (615) 532-2910
Jeff.hill@ag.tn.gov
brant.harrell@ag.tn.gov
anne.simmons@ag.tn.gov

WILLIAM TILLNER, B.P.R. No. 22312
Assistant Attorney General
Office of the Tennessee Attorney General
2nd Floor Donnelly J. Hill Building
170 North Main Street
Memphis, TN 38103
Phone: (901) 543-9039
Facsimile: (901) 543-9025
bill.tillner@ag.tn.gov

Attorneys for the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via electronic mail and via U.S. Mail on this the 5th day of December to Gerald D. Neenan, Kendra Sampson, Neal and Harwell, PLC, 150 Fourth Avenue North, Suite 2000, Nashville, Tennessee 37219.

and:

Clayton S. Friedman
Manatt, Phelps & Phillips
695 Town Center Drive
Costa Mesa, CA 92626

WILLIAM TILLNER